

## Internal Revenue Code Section 49(a)(1)(D)(ii)(II)

At-risk rules.

(a) General rule.

(1) Certain nonrecourse financing excluded from credit base.

(A) Limitation. The credit base of any property to which this paragraph applies shall be reduced by the nonqualified nonrecourse financing with respect to such credit base (as of the close of the taxable year in which placed in service).

(B) Property to which paragraph applies. This paragraph applies to any property which—

(i) is placed in service during the taxable year by a taxpayer described in section 465(a)(1) [IRC Sec. 465(a)(1)], and

(ii) is used in connection with an activity with respect to which any loss is subject to limitation under section 465 [IRC Sec. 465].

(C) Credit base defined. For purposes of this paragraph, the term "credit base" means—

(i) the portion of the basis of any qualified rehabilitated building attributable to qualified rehabilitation expenditures,

(ii) the basis of any energy property,

(iii) the basis of any property which is part of a qualifying advanced coal project under section 48A [IRC Sec. 48A],

(iv) the basis of any property which is part of a qualifying gasification project under section 48B [IRC Sec. 48B], and

(v) the basis of any property which is part of a qualifying advanced energy project under section 48C [IRC Sec. 48C].

(D) Nonqualified nonrecourse financing.

(i) In general. For purposes of this paragraph and paragraph (2), the term "nonqualified nonrecourse financing" means any nonrecourse financing which is not qualified commercial financing.

(ii) Qualified commercial financing. For purposes of this paragraph, the term "qualified commercial financing" means any financing with respect to any property if—

(I) such property is acquired by the taxpayer from a person who is not a related person,



(II) the amount of the nonrecourse financing with respect to such property does not exceed 80 percent of the credit base of such property, and

(III) such financing is borrowed from a qualified person or represents a loan from any Federal, State, or local government or instrumentality thereof, or is guaranteed by any Federal, State, or local government.

Such term shall not include any convertible debt.

(iii) Nonrecourse financing. For purposes of this subparagraph, the term "nonrecourse financing" includes—

(I) any amount with respect to which the taxpayer is protected against loss through guarantees, stop-loss agreements, or other similar arrangements, and

(II) except to the extent provided in regulations, any amount borrowed from a person who has an interest (other than as a creditor) in the activity in which the property is used or from a related person to a person (other than the taxpayer) having such an interest.

In the case of amounts borrowed by a corporation from a shareholder, subclause (II) shall not apply to an interest as a shareholder.

(iv) Qualified person. For purposes of this paragraph, the term "qualified person" means any person which is actively and regularly engaged in the business of lending money and which is not—

(I) a related person with respect to the taxpayer,

(II) a person from which the taxpayer acquired the property (or a related person to such person), or

(III) a person who receives a fee with respect to the taxpayer's investment in the property (or a related person to such person).

(v) Related person. For purposes of this subparagraph, the term "related person" has the meaning given such term by section 465(b)(3)(C) [IRC Sec. 465(b)(3)(C)]. Except as otherwise provided in regulations prescribed by the Secretary, the determination of whether a person is a related person shall be made as of the close of the taxable year in which the property is placed in service.

(E) Application to partnerships and S corporations. For purposes of this paragraph and paragraph (2)—

(i) In general. Except as otherwise provided in this subparagraph, in the case of any partnership or S corporation, the determination of whether a partner's or shareholder's allocable share of any financing is nonqualified nonrecourse financing shall be made at the partner or shareholder level.

(ii) Special rule for certain recourse financing of S corporation. A shareholder of an S corporation shall be treated as liable for his allocable share of any financing provided by a qualified person to such corporation if—

(I) such financing is recourse financing (determined at the corporate level), and

(II) such financing is provided with respect to qualified business property of such corporation.

(iii) Qualified business property. For purposes of clause (ii), the term "qualified business property" means any property if—

(I) such property is used by the corporation in the active conduct of a trade or business,

(II) during the entire 12-month period ending on the last day of the taxable year, such corporation had at least 3 full-time employees who were not owner-employees (as defined in section 465(c)(7)(E)(i) [IRC Sec. 465(c)(7)(E)(i)]) and substantially all the services of whom were services directly related to such trade or business, and

(III) during the entire 12-month period ending on the last day of such taxable year, such corporation had at least 1 full-time employee substantially all of the services of whom were in the active management of the trade or business.

(iv) Determination of allocable share. The determination of any partner's or shareholder's allocable share of any financing shall be made in the same manner as the credit allowable by section 38 [IRC Sec. 38] with respect to such property.

(F) Special rules for energy property. Rules similar to the rules of subparagraph (F) of section 46(c)(8) [IRC Sec. 46(c)(8)] (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990 [enacted Nov. 5, 1990]) shall apply for purposes of this paragraph.

(2) Subsequent decreases in nonqualified nonrecourse financing with respect to the property.

(A) In general. If, at the close of a taxable year following the taxable year in which the property was placed in service, there is a net decrease in the amount of nonqualified nonrecourse financing with respect to such property, such net decrease shall be taken into account as an increase in the credit base for such property in accordance with subparagraph (C).

(B) Certain transactions not taken into account. For purposes of this paragraph, nonqualified nonrecourse financing shall not be treated as decreased through the surrender or other use of property financed by nonqualified nonrecourse financing.

(C) Manner in which taken into account.

(i) Credit determined by reference to taxable year property placed in service. For purposes of determining the amount of credit allowable under section 38 [IRC Sec. 38] and the amount of credit subject to the early disposition or cessation rules under section 50(a) [IRC Sec. 50(a)], any increase in a taxpayer's credit base for any property by reason of this paragraph shall be taken into account as if it were property placed in service by the taxpayer in the taxable year in which the property referred to in subparagraph (A) was first placed in service.

(ii) Credit allowed for year of decrease in nonqualified nonrecourse financing. Any credit allowable under this subpart [IRC Sections 46 et seq.] for any increase in qualified investment by reason of this paragraph shall be treated as earned during the taxable year of the decrease in the amount of nonqualified nonrecourse financing.

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